(2)

No. 95-1957

In the Supreme Court of the United States

OCTOBER TERM, 1995

STATE OF ALASKA, PETITIONER

v.

BRUCE E. BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
ANNE S. ALMY
JEFFREY P. KEHNE
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

25 pp

QUESTION PRESENTED

The Quiet Title Act of 1972 (QTA), 28 U.S.C. 2409a, authorizes suits against the United States to adjudicate title disputes respecting real property in which the United States claims an interest, but excludes suits pertaining to "trust or restricted Indian lands," 28 U.S.C. 2409a(a). The question presented is whether, as the courts below held, the QTA's exclusion withholds jurisdiction from the federal courts to review a determination by the Department of the Interior that an allotment held in trust by the United States for an Alaska Native takes precedence over the State's right-of-way.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Aguilar v. *United States*, 474 F. Supp. 840 (D. Alaska 1979) 6

Alaska v. *Babbitt (Albert Allotment)*, 38 F.3d 1068 (9th Cir. 1994) 10, 15, 19

Alaska v. *Bryant*, 129 I.B.L.A. 35 (1994), judicial challenge dismissed, *Alaska* v. *Babbitt (Bryant Allotment)*, No. 94-301-CV (D. Alaska Sept. 18, 1995), appeal pending, No. 95-36122 (9th Cir.) 9

Alaska v. *13.90 Acres of Land*, 625 F. Supp. 1315 (D. Alaska 1985), aff'd *sub nom. Etalook* v. *Exxon Pipeline Co.*, 831 F.2d 1440 (9th Cir. 1987) 6

Block v. *North Dakota*, 461 U.S. 273 (1983) 7, 9, 10, 11, 12, 19

Dalton v. *Specter*, 114 S. Ct. 1719 (1994) 15

Donnelly v. *United States*, 850 F.2d 1313 (9th Cir. 1988), cert. denied, 488 U.S. 1046 (1989) 15

Florida Dep't of Business Regulation v. *United States Dep't of Interior*, 768 F.2d 1248 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986) 13, 14

Frank Sanford, 119 I.B.L.A. 147 (1991) 17

Golden Valley Elec. Ass'n (On Reconsideration), 98 I.B.L.A. 203 (1987) 6

Hallstrom v. *Tillamook County*, 493 U.S. 20 (1989) 19

Heirs of Simon Paneak, 55 I.B.L.A. 305 (1981) 18

Cases—Continued: Page

International Primate Protection League v. *Administrators of the Tulane Educ. Fund*, 500 U.S. 72 (1991) 12
Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) 10, 12
Malone v. *Bowdoin*, 369 U.S. 643 (1962) 10, 17
McCall v. *Andrus*, 628 F.2d 1185 (9th Cir. 1980), cert. denied, 450 U.S. 996 (1981) 18-19
Payne v. *Central Pacific Ry.*, 255 U.S. 228 (1921) 17-18
South Dakota v. *United States Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995), petition for cert. pending, No. 95-1956 ..... 13, 14
Southern Idaho Conference Ass'n of Seventh Day Adventists v. *United States*, 418 F.2d 411 (9th Cir. 1969) 17
State of Alaska, 62 I.B.L.A. 187 (1982) 17
State of Alaska (Albert Allotment on Reconsideration), 110 I.B.L.A. 224 (1989), judicial challenge dismissed, *Alaska* v. *Babbitt (Albert Allotment)*, No. F90-006 Civ. (D. Alaska Mar. 4, 1993), aff'd, 38 F.3d 1068 (9th Cir. 1994) 9
State of Alaska (John Billum, Jr.), 127 I.B.L.A. 137 (1993) 17
State of Alaska (Williams Allotment), 125 I.B.L.A. 21 (1992), judicial challenge dismissed, *Alaska* v. *Babbitt (Williams Allotment)*, No. F93-016 Civ. (D. Alaska Jan. 21, 1994), aff'd mem., 41 F.3d 1513 (9th Cir. 1994), cert. denied, 115 S. Ct. 2609 (1995) 9
Stockley v. *United States*, 260 U.S. 532 (1923) 6
United States v. *Flynn*, 53 I.B.L.A. 208 (1981) 6
United States v. *Mottaz*, 476 U.S. 834 (1986) 9, 10
Wildman v. *United States*, 827 F.2d 1306 (9th Cir. 1987) 7, 19

Constitution, statutes and regulations: Page

U.S. Const. Art. IV, § 3, Cl. 2 (Property Clause) 15
Act of Aug. 2, 1956, ch. 891, 70 Stat. 954 2
Administrative Procedure Act, 5 U.S.C. 701 *et seq* 10
Alaska Native Allotment Act of 1906, ch. 2469, 34 Stat. 197 2
43 U.S.C. 270-1 (1970) 3, 16
43 U.S.C. 270-1 to 270-3 (1970) 2
Alaska Statehood Act of 1958, Pub. L. No. 85-508, § 6(b), 72 Stat. 340 3-4
48 U.S.C. Ch. 2 note 4
Alaska Native Claims Settlement Act, Pub. L. No. 92-203, § 18(a), 85 Stat. 710 2
43 U.S.C. 1617(a) 2
Indian Reorganization Act of 1934, § 5, 25 U.S.C. 465 14
Quiet Title Act of 1972, 28 U.S.C. 2409a 2, 7
28 U.S.C. 2409a(a) 2, 7, 8, 9
28 U.S.C. 2409a(m) 19
Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq.* 19
23 U.S.C. 317(a) 17
23 U.S.C. 317(c) 17
43 C.F.R.:
Section 244.7(a) (1954) 17
Section 244.7(a) (1964) 17
Section 244.54(a) n.28 (1954) 17
Section 244.54(b) n.26 (1964) 17
Section 2234.2-4(b)(4) (1969) 5
Section 4.411(a) 6
Section 4.450 (1979) 4

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1957

STATE OF ALASKA, PETITIONER

v.

BRUCE E. BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 75 F.3d 449. The order of the district court (Pet. App. 33a-39a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1995. A petition for rehearing was denied on March 19, 1996. Pet. App. 2a-3a. The petition for a writ of certiorari was filed on June 3, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The State of Alaska challenges a determination by the Department of the Interior that a highway right-of-way that the State has been granted across federal land is partially preempted by an allotment of land to Alaska Native Evelyn Foster. The Bureau of Land Management (BLM) ruled that Foster's claim as allottee to land underlying the right-of-way took precedence over the State's right-of-way. On administrative appeal, the Interior Board of Land Appeals (IBLA) affirmed. Alaska sought judicial review of the IBLA's decision, but the district court held that it lacked subject-matter jurisdiction under the Quiet Title Act of 1972 (QTA), 28 U.S.C. 2409a, which excludes from its waiver of sovereign immunity lawsuits against the United States that involve "trust or restricted Indian lands," 28 U.S.C. 2409a(a). Pet. App. 33a-39a. The court of appeals affirmed. *Id.* at 1a-12a.

1. In June 1971, Evelyn Foster submitted an application under the Alaska Native Allotment Act of 1906 (1906 Allotment Act), ch. 2469, 34 Stat. 197, requesting the allotment of an unsurveyed tract of land in south-central Alaska that was later determined to cover roughly 130 acres.[1] The Act authorized the Secretary of the Interior to grant up to 160 acres of "vacant, unappropriated, and unreserved nonmineral

---

[1] The 1906 Allotment Act was amended by the Act of August 2, 1956, ch. 891, 70 Stat. 954, and codified, during the period relevant here, at 43 U.S.C. 270-1 to 270-3 (1970). On December 18, 1971, the 1906 Allotment Act was repealed by Section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), Pub. L. No. 92-203, 85 Stat. 710, codified at 43 U.S.C. 1617(a). However, Section 18(a) of ANCSA preserved applications, such as Evelyn Foster's, that were filed before ANCSA's enactment. 85 Stat. 710.

land" to qualified Alaska Natives. 43 U.S.C. 270-1 (1970). Foster claimed a right to the allotment on the ground that she had begun using the land for subsistence purposes in August 1964. Pet. App. 3a-4a, 84a.

2. The tract that Foster requested is crossed by the Talkeetna-to-Summit segment of the George Parks Highway, which was constructed between 1969 and 1971. Pet. App. 3a-4a, 42a. Alaska claims various rights-of-way associated with that highway. The BLM issued four decisions addressing various claims respecting the competing property rights in the land that Foster requested.

a. The BLM's initial decision, issued in February 1979, summarized a field report that verified Foster's claim to subsistence use of the property, beginning in August 1964. See Pet. App. 63a-66a. The BLM accordingly determined that Foster had satisfied the use and occupancy requirements of the 1906 Allotment Act, and it directed that the property requested by Foster (with the exception of eight acres tentatively found to be mineral in character and therefore ineligible for allotment) be "held for approval"—that is, reserved for the issuance of an allotment certificate following completion of an official survey. See *id.* at 65a.

b. The BLM issued a second, related decision concerning the Foster allotment in December 1979. Pet. App. 59a-62a. That decision reiterated the BLM's determination that Foster had used the land requested in her application "in such a manner as to satisfy the substantial use and occupancy requirements of the Native Allotment Act," and it rejected land selections that Alaska had submitted in August 1965 under the Alaska Statehood Act of July 7, 1958, Pub. L. No.

85-508, § 6(b), 72 Stat. 340, codified at 48 U.S.C. Ch. 2 note at 228, insofar as those selections conflicted with Foster's allotment. Pet. App. 61a. The BLM advised Alaska of its right to initiate a "private contest proceeding" challenging Foster's allotment. *Ibid.*, citing 43 C.F.R. 4.450 (1979). The State not only declined to contest the rejection of its Statehood Act selections, but it expressly informed the BLM that it did "*not* intend to initiate contest proceedings" against Foster's application. See Foster's C.A. Supp. Excerpts of Record at CR 32, Exh. 3, Attach. D.

c. In March 1989, the BLM issued a third decision concerning conflicting claims to the Foster allotment. See Pet. App. 53a-58a. By that time, the allotment had been formally delineated in a June 1985 survey. See *id.* at 43a. The BLM's March 1989 decision addressed the status of three state rights-of-way. The BLM ruled that two rights-of-way that had been granted to the State before Foster initiated use and occupancy—an October 1961 material-site right-of-way and a November 1962 roadbed right-of-way—took priority over Foster's claim. Foster's allotment was therefore made "subject to" those rights-of-way. *Id.* at 55a. The third right-of-way, a June 1965 material-site right-of-way, was found to have been preempted by Foster's allotment. *Id.* at 55a-56a. The BLM ruled that Foster held a "preference right" to her allotment relating back to August 1964, when she began using and occupying the land in conformity with the requirements of the 1906 Allotment Act, and that this preference right "preempt[ed] conflicting applications filed after that time." *Id.* at 56a.[2]

---

[2] The BLM's February 1979 decision had indicated that the 1965 material site was mineral in character and therefore

d. Upon receiving the March 1989 decision, Alaska asked the BLM to clarify the status of a fourth right-of-way. By letter dated April 5, 1989, the State requested a formal statement from the BLM that Foster's allotment was subject not only to the State's November 1962 roadbed right-of-way, but also to a May 1969 amendment to that right-of-way. The BLM denied that request in April 1989. Pet. App. 49a-52a. Adhering to the logic of its earlier decision nullifying the 1965 material-site right-of-way, the BLM determined that Foster's preference right, dating from August 1964, defeated the State's amended roadbed right-of-way. *Id.* at 50a. The BLM noted that the amended roadbed right-of-way had been expressly made "subject to * * * valid rights existing on the date of the grant." *Id.* at 82a; see 43 C.F.R. 2234.2-4(b)(4) (1969) (authorizing the BLM to impose "any conditions deemed necessary" or "appropriate").

3. Alaska appealed the BLM's April 1989 decision to the IBLA, which affirmed the BLM's ruling. Pet. App. 40a-48a. The IBLA rejected Alaska's assertion that a right-of-way issued under the 1958 Right-of-Way Act necessarily takes precedence over a Native allotment issued in response to an application filed after the grant of the conflicting right-of-way. The IBLA stated:

> A Native allotment will not be made subject to a right-of-way grant where qualifying use and occupancy that is open and notorious is initiated

---

ineligible for allotment under the 1906 Allotment Act. See Pet. App. 64a. However, the March 1989 decision concluded that the eight-acre parcel was not, in fact, mineral in character and was therefore eligible for allotment. See *id.* at 54a (discussed by the IBLA at Pet. App. 43a-44a).

> by the Native applicant prior to issuance of the right-of-way grant, subject to valid existing rights, thereby giving rise to an inchoate preference right that subsequently vests after completion of 5 years of use and occupancy and the filing of an allotment application.

Id. at 45a, citing *Golden Valley Elec. Ass'n (On Reconsideration)*, 98 I.B.L.A. 203 (1987).[3] The IBLA also rejected Alaska's attacks on the timeliness of Foster's application and the sufficiency of her evidence concerning use and occupancy. The IBLA ruled that those matters had been resolved by the BLM's February 1979 and March 1989 decisions and that Alaska's failure to bring timely administrative appeals barred those objections. See Pet. App. 44a-45a, citing 43 C.F.R. 4.411(a).

4. Alaska brought suit in federal district court against the United States and the Secretary of the Interior, claiming that the IBLA had erred when it

---

[3] *Golden Valley* reversed earlier IBLA precedent on the rights acquired by allottees through the initiation of use and occupancy, see, *e.g.*, *United States* v. *Flynn*, 53 I.B.L.A. 208, 234 (1981), based on the IBLA's review of the federal courts' analyses of allottee interests. See, *e.g.*, *Alaska* v. *13.90 Acres of Land*, 625 F. Supp. 1315, 1319 (D. Alaska 1985) (potential allottee's "inchoate preference right" relates back to initiation of occupancy and thus defeats right-of-way claim), aff'd *sub nom. Etalook* v. *Exxon Pipeline Co.*, 831 F.2d 1440 (9th Cir. 1987); *Aguilar* v. *United States*, 474 F. Supp. 840, 845 (D. Alaska 1979) (Alaska Natives' preference rights are based on use and occupancy and thus preclude conveyance of potential allotments to the State); cf. *Stockley* v. *United States*, 260 U.S. 532, 544 (1923) (Presidential order withdrawing land from public domain does not apply to unpatented homestead claim since "preliminary homestead entry * * * confer[s] * * * exclusive right of possession").

neither rejected Foster's allotment application outright nor subordinated her allotment to the State's 1969 amended roadbed right-of-way. The district court dismissed for lack of subject-matter jurisdiction. Pet. App. 33a-39a. The court reasoned that the only plausible jurisdictional basis for Alaska's suit against the United States was the QTA, 28 U.S.C. 2409a, which waives federal sovereign immunity to civil actions seeking to adjudicate title disputes involving real property in which the United States claims an interest. See Pet. App. 35a & n.1, 38a & n.2 (APA review unavailable). The court noted, however, that the QTA's waiver of sovereign immunity expressly excludes disputes concerning "trust or restricted Indian lands." *Id.* at 35a, quoting 28 U.S.C. 2409a(a).

Relying on court of appeals precedent applying the Indian lands exception, the district court found that the QTA bars judicial review of title disputes if "the United States has a 'colorable claim' that the land is held in trust for a Native." Pet. App. 36a, quoting *Wildman* v. *United States*, 827 F.2d 1306, 1309 (9th Cir. 1987). The State's challenge to the timeliness of Foster's application, the court found, did not deprive the United States of a colorable basis for identifying the Foster allotment as trust or restricted Indian land. *Id.* at 37a-38a.

5. On appeal, Alaska relied primarily on an argument that an "*ultra vires* exception" to the doctrine of sovereign immunity excused the State from the usual requirement that it identify a clear federal waiver of immunity. Alaska C.A. Br. 1, 8-19. The court of appeals rejected that argument, concluding that *Block* v. *North Dakota*, 461 U.S. 273 (1983), established the QTA's preclusion of ultra vires review.

Pet. App. 7a-11a. The court noted that *Block* had squarely rejected the use of officer suits as a means of avoiding restrictions that the QTA places on the United States' waiver of immunity to suits challenging federal interests in land. *Id.* at 8a. The court found no merit in Alaska's attempt to distinguish its ultra vires theory from the "officer's suit" theory, explaining that ultra vires suits are merely "a subgroup of officer's suits as a whole." *Id.* at 8a-9a.

Alaska also argued, in the alternative, that the QTA's waiver of sovereign immunity applies, notwithstanding the Indian lands exception, because the Secretary lacked colorable grounds for characterizing Foster's allotment as trust or restricted Indian land. The court of appeals rejected Alaska's argument that the State's 1961 material-site right-of-way "appropriated" the land within the boundaries of that right-of-way. The court noted that Alaska had never raised the 1961 material-site right-of-way as a ground for reducing the scope of Foster's allotment, "either when [the State] was first informed of the allotment in 1979, or during the later BLM and IBLA proceedings." Pet. App. 7a. The court ruled that the Secretary's failure to respond to an objection that the State never raised during the administrative process did not deprive the Secretary of a colorable basis for his decision. *Ibid.*

ARGUMENT

Alaska claims that, notwithstanding the QTA's exclusion of suits pertaining to "trust or restricted Indian lands," 28 U.S.C. 2409a(a), the courts have jurisdiction to review this dispute between the State and the Secretary of the Interior over the extent of a Native Alaskan's allotment. The court of appeals'

ruling that the QTA's reservation of sovereign immunity precludes review is correct, and it does not conflict with any decision of this Court or any other court. Further review is therefore unwarranted.[4]

1. The QTA was enacted "to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." *Block* v. *North Dakota*, 461 U.S. 273, 286 (1983); *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986). The QTA provides, however, that its waiver of sovereign immunity "does not apply to trust or restricted Indian lands. 28 U.S.C. 2409a(a). That exclusion serves "to retain the United States' immunity from suit by third parties challenging the United States' title to land held in trust for Indians." *Mottaz*, 476 U.S. at 842. Congress retained federal immunity against such lawsuits in recognition of the " 'solemn obligations' and 'specific

---

[4] This case represents the State's third attempt (on somewhat varied theories) to obtain judicial review of a decision involving the relationship between an Alaska Native allotment and a state right-of-way. See *State of Alaska (Williams Allotment)*, 125 I.B.L.A. 21 (1992), judicial challenge dismissed, *Alaska* v. *Babbitt (Williams Allotment)*, No. F93-016 Civ. (D. Alaska Jan. 21, 1994), aff'd mem., 41 F.3d 1513 (9th Cir. 1994) (Table), cert. denied, 115 S. Ct. 2609 (1995); *State of Alaska (Albert Allotment on Reconsideration)*, 110 I.B.L.A. 224 (1989), judicial challenge dismissed, *Alaska* v. *Babbitt (Albert Allotment)*, No. F90-006 Civ. (D. Alaska Mar. 4, 1993) (tentative opinion, confirmed by May 19, 1993, judgment), aff'd, 38 F.3d 1068 (9th Cir. 1994). A fourth case is currently pending before the Ninth Circuit. See *Alaska* v. *Bryant*, 129 I.B.L.A. 35 (1994), judicial challenge dismissed, *Alaska* v. *Babbitt (Bryant Allotment)*, No. 94-301-CV (D. Alaska Sept. 18, 1995), appeal pending, No. 95-36122 (9th Cir.). Of course, Alaska is collaterally estopped to relitigate claims against the Secretary that were rejected in the prior litigation.

commitments' that the Federal Government had made to the Indians regarding Indian lands," and the consequent inappropriateness of unilaterally "subject[ing] those lands to suit without the Indians' consent." *Id.* at 843 n.6; *Block*, 461 U.S. at 283; *Alaska* v. *Babbitt (Albert Allotment)*, 38 F.3d 1068, 1072-1073 & n.4 (9th Cir. 1994).[5]

Alaska argues (Pet. 6-22) that it is entitled to judicial review without regard to limitations that Congress has placed on the waivers of federal immunity in the QTA because the State has challenged what it claims is ultra vires action by the Secretary of the Interior. The State relies on *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), and *Malone* v. *Bowdoin*, 369 U.S. 643 (1962), which indicated that courts could exercise jurisdiction over land title suits against federal officers if those officers acted outside of the scope of their constitutional or statutory authority. However, as this Court indicated in *Block*, Congress enacted the QTA against the backdrop of *Larson* and *Malone*. The QTA displaces all other bases—statutory and nonstatutory—for judicial review of claims challenging federal interests in real property, and hence it precludes claims based

---

[5] The QTA's express exclusion of title suits involving trust or restricted land prevents parties from obtaining review of such claims in suits under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, because the APA specifically confers no "authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought," and the QTA is such an "other statute." *Block*, 461 U.S. at 286 n.22; see also *ibid.* ("the QTA expressly 'forbids the relief' which would be sought under [5 U.S.C. 702]"); *Albert Allotment*, 38 F.3d at 1075.

on alleged ultra vires action by federal officials. See *Block*, 461 U.S. at 280-286.

The analysis in *Block* makes clear that judicial review of Alaska's attack on the Foster allotment is unavailable, because that claim is based not on the "careful and thorough remedial scheme" set forth in the QTA, 461 U.S. at 285, but instead on a non-statutory theory of ultra vires conduct by a government officer. Recognition of the theory that Alaska advances here would undercut the carefully considered exceptions to and limitations upon the QTA's waiver of sovereign immunity. As the Court stated in *Block*:

> If we were to allow claimants to try the Federal Government's title to land under an officer's-suit theory, the Indian lands exception to the QTA would be rendered nugatory. The United States could also be dispossessed of the disputed property without being afforded the option of paying damages, thereby thwarting the congressional intent to avoid disruptions of costly federal activities. Finally, and most relevant to the present cases, the QTA's 12-year statute of limitations * * * could be avoided.

Ibid. (emphasis added). *Block* recognizes that the QTA is "the exclusive means by which adverse claimants c[an] challenge the United States' title to real property." *Id.* at 286. The court of appeals accordingly was correct in ruling that *Block* required the dismissal of Alaska's officer's suit.

Alaska's assertion that the federal government is subject to an officer's suit in this case departs from the position that it has simultaneously taken in a case pending before this Court, *State of Idaho* v. *Coeur*

d'Alene Tribe of Idaho, cert. granted, 116 S. Ct. 1415 (1996) (No. 94-1474). Alaska has joined in a brief amicus curiae in that case in which it has argued that a *State* is immune from an officer's suit that "goes to possession and control of a state's navigable waters." See 94-1474 States of California, Alabama, Alaska, *et al.*, Amici Br. at 11 (filed June 3, 1996). That brief specifically relies on *Block*, noting that "an officer's suit may not be used as a substitute for a *federal* quiet title action, since it would constitute a device for circumventing Federal sovereign immunity." *Id.* at 14.

Alaska does not mention the position that it has taken in its *Coeur d'Alene* brief. It does, however, posit a distinction (Pet. 11-12) between "officer's suits," which *Block* unquestionably proscribes, and the State's current challenge to "ultra vires" agency action. That asserted distinction is without merit. As the court of appeals correctly observed, this Court has treated ultra vires suits as simply a "subgroup of officer's suits as a whole." Pet. App. 8a-9a. See *Block*, 461 U.S. at 281-282; *Larson*, 337 U.S. at 689.[6] Moreover, the reasons that *Block* gives for disallowing the

---

[6] *Larson*, a leading decision in the development of the "officer's suit" doctrine, repeatedly refers to ultra vires suits as one class of claims that litigants may prosecute against federal officers without identifying a statutory waiver of sovereign immunity. See 337 U.S. at 689 (litigants may challenge conduct that is "*ultra vires* [an official's] authority"); see *id.* at 694 (tortious act is not necessarily "*ultra vires* [an official's] authority"); see also *International Primate Protection League* v. *Administrators of the Tulane Educ. Fund*, 500 U.S. 72, 85-86 (1991) (noting that under *Larson* the question of immunity often "was resolved by examining whether an officer's challenged actions exceeded the powers the sovereign had delegated to him").

officer's suit alternative to QTA jurisdiction apply equally to Alaska's ultra vires claims. Acceptance of Alaska's theory of nonstatutory review, regardless of how it is packaged, would undercut the QTA's carefully crafted exceptions to and limitations upon the QTA's waiver of sovereign immunity (including, most notably, the Indian lands exception).

2. Alaska asserts that the Ninth Circuit's rejection of nonstatutory review under an ultra vires theory in this case conflicts with decisions of two other courts of appeals. See Pet. 16-18, discussing *Florida Dep't of Business Regulation* v. *United States Dep't of Interior*, 768 F.2d 1248 (11th Cir. 1985), cert. denied, 475 U.S. 1011 (1986), and *South Dakota* v. *United States Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995), petition for cert. pending, No. 95-1956 (filed June 3, 1996). Neither decision supports Alaska's request for review by this Court.

Florida did not address *Block*'s unambiguous holding that the QTA's comprehensive remedial scheme displaces nonstatutory review of challenges to federal interests in land. The Eleventh Circuit recited *Block*'s ruling that the QTA displaces APA review, 768 F.2d at 1254 & n.7, but it failed to acknowledge *Block*'s parallel ruling that the QTA displaces review under the officer's suit doctrine, see *id.* at 1251-1252 (discussing limits that *Larson* and *Malone* place on officer's suits). In any event, because the Eleventh Circuit found that the prerequisites for officer's suit jurisdiction had not been satisfied, *id.* at 1252 & 1255 n.9, its suggestion that officer's suits remain viable in the QTA context was mere dictum.

South Dakota also fails to support Alaska's request for review. In that case, South Dakota and the City of Oacoma sought APA review of a decision by the

Interior Department to place 91 acres of land, which had been purchased in fee by the Lower Brule Sioux Tribe, into trust status pursuant to Section 5 of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. 465. The panel majority expressed "doubt whether the [QTA] precludes APA review of agency action by which the United States *acquires* title." 69 F.3d at 881 n.1. But the court concluded that it did not need to resolve that issue because, in its view, the QTA "does not bar claims 'that the Secretary acted unconstitutionally or beyond his statutory authority,'" *ibid.*, quoting *Florida*, 768 F.2d at 1255 n.9, and because, in its view, Section 5 of the IRA represents an unconstitutional delegation of legislative power, see 69 F.3d at 881-885. Although the Eighth Circuit recites the *Florida* dictum concerning nonstatutory review of agency actions in excess of statutory as well as constitutional authority, its decision in *South Dakota* asserts jurisdiction only in the constitutional context.[7]

Alaska attempts to create a conflict between *South Dakota* and the court of appeals' decision in this case by adding a constitutional dimension to its allegation that the Secretary exceeded his authority under the

---

[7] The government has petitioned for certiorari in *South Dakota*, requesting that the judgment of the court of appeals be vacated with instructions to remand to the Secretary of the Interior for reconsideration. As our certiorari petition explains, the Interior Department has recently promulgated regulations to ensure that affected parties may seek APA review of decisions by the Interior Department to take land into trust *before* trust status attaches, and judicial review thereafter is barred by the Indian lands exception to the QTA. See Petition for a Writ of Certiorari at 23-27, *United States Dep't of the Interior* v. *South Dakota* (No. 95-1956).

1906 Allotment Act. According to the State (Pet. 20-21), the Secretary's allotment of land that was closed to entry under the 1906 Allotment Act infringes upon Congress's exclusive authority under the Property Clause to control the conveyance of interests in federal lands. Alaska did not raise that constitutional claim before the Interior Department or the courts below and cannot properly introduce it now. In any event, the Property Clause does not make a constitutional case of every claim that a federal land management agency has violated a statutory restriction pertaining to transfers of interests in federal land.[8] As we explain below, Alaska's objections that the Secretary improperly allotted appropriated, mineral land present nothing more than routine (and, in this case, unfounded) disagreements with the Secretary's interpretation of statutes that he is charged with administering.[9]

3. Even if review of title claims against the United States were available outside the QTA under an ultra vires theory, Alaska fails to demonstrate ultra vires conduct in this case. Alaska alleges that the Secre-

---

[8] Cf. *Dalton* v. *Specter*, 114 S. Ct. 1719, 1726 (1994) ("If all executive actions in excess of statutory authority were *ipso facto* unconstitutional, * * * there would have been little need in *Larson* for our specifying unconstitutional and ultra vires conduct as separate categories.").

[9] Alaska also complains that the Ninth Circuit's rejection of review under an ultra vires theory in this case contradicted two of that court's earlier decisions. See Pet. 13-16, discussing *Donnelly* v. *United States*, 850 F.2d 1313 (9th Cir. 1988), cert. denied, 488 U.S. 1046 (1989), and *Albert Allotment*, *supra*. We disagree with Alaska's characterization of those cases. See Pet. App. 11a. But in any event, this Court does not ordinarily review intra-circuit conflicts.

tary exceeded his authority under the 1906 Allotment Act to allot "vacant, unappropriated, and unreserved nonmineral land," 43 U.S.C. 270-1 (1970), because the land allotted to Foster had earlier been appropriated and transferred to the State and was mineral in character. Alaska is wrong. The Secretary's decision that Foster qualified for an allotment was plainly within the Secretary's authority.

Alaska first argues (Pet. 18-20, 24-25) that the Secretary exceeded his authority in approving the portion of Foster's allotment that she holds subject to the State's 1961 material-site right-of-way. See Pet. App. 55a. Foster's allotment, according to the State, should not merely have been subordinated to the 1961 material-site right-of-way, it should have been drawn to exclude that area on grounds that the land covered by the 1961 right-of-way had already been "appropriated" to the State. According to the State, because Foster's entry onto this area was invalid, her use and occupancy should not have taken precedence over the State's 1969 roadbed right-of-way across the same area.

Alaska waived that claim at the administrative level. As the court of appeals observed, Alaska did not ask the Interior Department to exclude the 1961 material-site right-of-way from Foster's allotment. See Pet. App. 6a-7a (noting that Alaska first raised this claim during appellate argument). Alaska attacked the BLM's April 1989 decision on a number of grounds, but never mentioned the supposed closure of the land to entry by allottees in 1961. In fulfilling its responsibility to determine conflicting claims to public lands, the Interior Department cannot be said to exceed its statutory authority by failing to respond to objections that claimants did not raise.

In any event, Alaska's contention that right-of-way grants under the 1958 Right-of-Way Act "appropriate" land and close it to entry by native allottees is incorrect. The interest that Alaska acquired in 1961 was not a fee estate, but rather was a right-of-way, subject to immediate reversion upon cessation of the intended use. 23 U.S.C. 317(a) and (c).[10] The IBLA and the courts have not treated such rights-of-way as an "appropriation" of the fee that closes land to entry by allottees.[11] Foster's entry onto this land in August 1964 was fully consistent with Interior Department regulations and with long-standing judicial and administrative precedent. Alaska has identified, at most, a dispute over the Interior Department's interpretation of federal property principles that are within the scope of the agency's responsibility. That dispute cannot give rise to a cause of action for nonstatutory review of allegedly ultra vires executive conduct.[12]

---

[10] See 43 C.F.R. 244.7(a) (1954) (right-of-way grants do not confer "any estate of any kind in fee in the lands"); see 43 C.F.R. 244.54(a) n.28 (1954) (interest transferred "is merely a right-of-way"); see also 43 C.F.R. 244.7(a), 244.54(b) n.26 (1964) (corresponding provisions in revised codification).

[11] See, *e.g.*, *Southern Idaho Conference Ass'n of Seventh Day Adventists* v. *United States*, 418 F.2d 411, 415 (9th Cir. 1969) (discussing relationship between material-site right-of-way and underlying fee that had been patented to a later entrant); *State of Alaska (John Billum, Jr.)*, 127 I.B.L.A. 137, 143 (1993), citing *Frank Sanford*, 119 I.B.L.A. 147, 151 (1991); see also *State of Alaska*, 62 I.B.L.A. 187, 194-195 (1982) (homesteaders acquired land subject to right-of-way that had previously been granted to the State).

[12] See *Malone*, 369 U.S. at 644 n.2, 647-648 (allegation that federal officials occupy land under defective title does not make out claim of ultra vires conduct); compare *Payne* v.

Alaska also contends (Pet. 18-19 & n.7) that the Secretary's allotment to Foster was ultra vires because the entire area that is burdened with the 1961 right-of-way is not "nonmineral land," as required by the 1906 Allotment Act. That claim, like the State's prior appropriation claim, was not raised in the Interior Department's proceedings. The BLM specifically addressed the mineral value of the land requested by Foster, and it tentatively excluded eight acres from the area that Foster had requested. See Pet. App. 64a-65a. But the BLM ultimately determined that the parcel was not, in fact, mineral land. *Id.* at 54a; see *id.* at 43a-44a. The State did not contest that determination before the IBLA, much less argue for the broader exclusion that it seeks here. As noted above, the Interior Department cannot reasonably be accused of exceeding its statutory mandate on the ground that it did not address an issue that was not raised.

Moreover, Alaska's claim that Foster's allotment includes mineral lands is not supported by the record below. The Interior Department determines whether lands are mineral in character under the 1906 Allotment Act by ascertaining whether they contain mineral deposits that could be expected to support a profitable, commercial mining operation. See *Heirs of Simon Paneak*, 55 I.B.L.A. 305, 310-311 (1981); see also, *e.g.*, *McCall* v. *Andrus*, 628 F.2d 1185, 1188 (9th Cir. 1980) (describing analogous test of anticipated profitability that determines whether miners have discovered patentable deposits), cert. denied, 450 U.S.

Central Pacific Ry., 255 U.S. 228, 234-235, 238 (1921) (finding of ultra vires executive action based on "depart[ure] from a plain official duty").

996 (1981). The State can point to no proof that the parcel requested by Foster could have supported commercial gravel mining operations in 1971.

4. Finally, Alaska argues (Pet. 22-24), in the alternative, that the QTA waives federal sovereign immunity to its suit, notwithstanding the Indian lands exception, because the United States lacks "a colorable claim to Indian land title." The court of appeals in this case followed its past decisions and reiterated that the United States must have a colorable basis for its assertions that the property qualifies as trust or restricted Indian land. *Albert Allotment*, 38 F.3d at 1076; *Wildman*, 827 F.2d at 1309. Alaska's argument that the Secretary lacks colorable grounds for treating part of Foster's allotment as trust or restricted Indian land rests on its view that the 1961 material-site right-of-way "appropriated" land and closed it to entry by allottees. As we have explained, that claim was not presented to the Interior Department and is meritless in any event. The court of appeals properly found that the United States had a colorable basis for characterizing Foster's entire allotment as Indian trust land. Pet. App. 7a.[13]

---

[13] We note that the QTA's comprehensive scheme blocks Alaska's suit not only under the Indian lands exception, but also under 28 U.S.C. 2409a(m), which requires States to provide 180 days' prior notice of their intention to file quiet title actions against the United States. Similar pre-suit notice requirements in other statutes have been strictly enforced even when they operate as limitations on suits against private parties as well as the federal government. *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 29-30 (1989) (notice requirement for citizen suits under the Resource Conservation and Recovery Act of 1976); compare *Block*, 461 U.S. at 286 n.23 (strictly enforcing QTA's 12-year limitations period).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
ANNE S. ALMY
JEFFREY P. KEHNE
Attorneys

AUGUST 1996

(3)

Supreme Court, U.S.
FILED
SEP 9 1996
CLERK

No. 95-1957

In the

Supreme Court of the United States

October Term, 1995

STATE OF ALASKA,

Petitioner,

vs.

BRUCE E. BABBITT, Secretary of the Interior; the UNITED STATES OF AMERICA; EVELYN C. FOSTER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

BRUCE M. BOTELHO
Attorney General

E. JOHN ATHENS, JR.
Counsel of Record
Assistant Attorney General
State of Alaska

PAUL R. LYLE
Assistant Attorney General
State of Alaska

Office of the Attorney General
100 Cushman Street, Suite 400
Fairbanks, Alaska 99701
Telephone: (907) 451-2811

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

14PP

TABLE OF CONTENTS

Page

ARGUMENT 1

I. The Ninth Circuit misinterpreted *Block* 1

a. Alaska's constitutional claim 3

b. The Secretary's limited authority 5

II. The Ninth Circuit's interpretation of *Block* creates a conflict between circuits 6

III. Administrative finality is inapposite to the jurisdiction of the court 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Block v. North Dakota, 461 U.S. 273 (1983) .. 1, 2, 3, 4, 7

Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986) 3

Dalton v. Specter, 114 S. Ct. 1719 (1994) 3, 4

Donnelly v. United States, 850 F.2d 1313 (9th Cir. 1988), *cert. denied sub nom. Donnelly v. Eklutna, Inc.*, 488 U.S. 1046 (1989) 8

Florida v. U.S. Department of Interior, 768 F.2d 1248 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986) ...6, 7

Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353 (9th Cir. 1978), *rev'd sub nom. on other grounds, Lake Country Estates Inc., v. Tahoe Regional Planning Agency*, 443 U.S. 391 (1979)..... 9

Lee v. United States, 809 F.2d 1406 (9th Cir. 1987) 8

South Dakota v. United States Department of Interior, 69 F.3d 878 (8th Cir. 1995)..... 1, 6, 7

State of Alaska v. Babbitt [Albert], 38 F.3d 1068 (9th Cir. 1994) 1, 6, 7

State of Alaska v. Babbitt [Foster], 67 F.3d 864 (9th Cir. 1995) 7

State of Alaska v. Babbitt [Foster], 75 F.3d 449 (9th Cir. 1996) 1, 2, 4, 6

State of Idaho v. Coeur d'Alene Tribe of Idaho, cert. granted, 116 S.Ct. 1415 (1996) (No. 94-1474) 2

Turner v. McMahon, 830 F.2d 1003 (9th Cir. 1987), *cert. denied*, 488 U.S. 818 (1988) 9

TABLE OF AUTHORITIES – Continued

Page

United States v. State of California, 332 U.S. 19 (1947) 3, 4

Utah Power & Light Co. v. United States, 243 U.S. 389 (1917) 3

Webster v. Doe, 486 U.S. 592 (1988) 3, 4

Wind River Mining Corp. v. United States, 946 F.2d 710 (9th Cir. 1991) 9

CONSTITUTIONAL PROVISION

U.S. Constitution, Art. 4, § 3, cl. 2 ..... 3, 4

STATUTES

23 U.S.C. § 317 5

28 U.S.C. § 2409a 1

43 U.S.C. § 270-1 5

MISCELLANEOUS

Frank Sanford, 119 IBLA 147 (1991) 6

ARGUMENT

I. The Ninth Circuit misinterpreted *Block*.

The issue in this case is whether the Ninth Circuit misinterpreted *Block v. North Dakota*, 461 U.S. 273 (1983). The Ninth Circuit ruled that this Court's decision in *Block* precludes judicial review of unconstitutional and statutorily prohibited agency action leading to the creation of Indian land. *State of Alaska v. Babbitt [Foster]*, 75 F.3d 449, 452 (9th Cir. 1996).

In defense of the Ninth Circuit's holding in *Foster*, respondents argue (Opp. at 13-16) that review of the Secretary's decision in this case would undercut the carefully crafted limitations on the waiver of immunity found in the Quiet Title Act[1] (QTA) and that, in any event, the Secretary plainly acted within his statutory authority to issue Native allotments.

The respondents carefully avoid casting their arguments in terms of the question presented by Alaska, to

---

[1] The purpose of the QTA, 28 U.S.C. § 2409a, is to protect Indian trust land. *State of Alaska v. Babbitt [Albert]*, 38 F.3d 1068, 1072 n. 4 (9th Cir. 1994). The respondents fail to explain how this purpose is consistent with the case at bar where a holding of immunity has the effect of preserving Alaska's possession and control of the public highway right-of-way. Neither do the respondents attempt to explain how the **creation** of Indian trust land is consistent with the implication of the QTA that this statute concerns land that already exists as Indian trust land. See, *South Dakota v. United States Dep't of Interior*, 69 F.3d 878, 881 n.1 (8th Cir. 1995) ("We doubt whether the Quiet Title Act precludes APA review of agency action by which the United States *acquires* title.") (emphasis in original).

wit: whether there is jurisdiction to review unconstitutional and statutorily prohibited Secretarial decisions which create Indian trust land. The Ninth Circuit has mistakenly adopted, under the guise of *Block*, the principle that the Secretary of the Interior may usurp Congress' exclusive constitutional authority to dispose of public land in regard to the creation of Indian lands and disregard the specific limitations Congress placed on the Secretary in the Allotment Act. *Block* plainly does not sanction such limitless discretion on the part of the Secretary.

Respondents argue (Opp. at 11, 12) that Alaska's position departs from what it argued in *State of Idaho v. Coeur d'Alene Tribe of Idaho, cert. granted*, 116 S.Ct. 1415 (1996) (No. 94-1474). Alaska's positions in *Foster* and *Idaho* are consistent. Alaska's position in *Idaho* does not equate an officer's suit to an action asserting *ultra vires* conduct of the Secretary. Alaska did not argue that *Block* precludes judicial review of Secretarial action which is unconstitutional and statutorily prohibited. *See* 94-1474, States of California, Alabama, Alaska, *et al.*, Amici Br. at 7-16. *Idaho* does not concern the *ultra vires* exception to sovereign immunity where jurisdiction is premised on the unconstitutional and statutorily prohibited action of the Secretary.

Respondents concede (Opp. at 12) that Alaska distinguishes the *ultra vires* exception from the officer's suit theory described in *Block*. Alaska has explained this distinction in detail. Pet. at 11-12. Moreover, it is a distinction recognized in Indian land cases by the Eighth and Eleventh Circuits and, until *Foster*, by the Ninth Circuit as well.

Respondents do not refute that *Block* did not involve a constitutional claim. Respondents ignore this Court's recognition that the QTA must be interpreted in a fashion comporting with constitutional strictures. *Block*, 461 U.S. at 286 n.23. The respondents' argument fails to respond to the holdings of this Court in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986) and *Webster v. Doe*, 486 U.S. 592 (1988). In *Bowen*, this Court affirmed that there is a strong presumption of judicial review of all agency actions. 476 U.S. at 672. In *Webster*, this Court held that review of constitutional claims can be precluded only where Congress clearly evidences such an intent. 486 U.S. at 603. Respondents offer no evidence that Congress intended the QTA's Indian land exception to preclude review of constitutional claims related to the creation of Indian land.

a. Alaska's constitutional claim.

Relying on *Dalton v. Specter*, 114 S.Ct. 1719 (1994) the respondents argue that Alaska's claim against the Secretary does not give rise to a constitutional claim. Unlike the separation of powers claim in *Dalton*, Alaska in this case alleges that the Secretary violated the Property Clause of the Constitution in approving Foster's allotment. The Supreme Court interprets the Property Clause as granting exclusive authority to Congress to dispose of public lands. *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404 (1917). Congress acts through legislation. The Property Clause prohibits both the courts and the executive agencies of government from disposing of public lands contrary to an Act of Congress. *United States v. State of California*, 332 U.S. 19, 27 (1947). Thus, where an

executive agency disposes of public land in a manner which violates the congressional limitations on that agency's disposal authority, it violates not only the statute which contains those limitations but the Property Clause as well. In *Foster*, the Ninth Circuit has now interpreted *Block* to shield from judicial scrutiny claims based on the Secretary's usurpation of authority that is vested exclusively with the Congress. Under *Webster*, review of such claims may only be precluded where Congress clearly intends that there be no review. Neither the Ninth Circuit in *Foster* nor the respondents point to a clear intent by Congress to preclude constitutional claims. Indeed, as pointed out above, this court in *Block* has already held that the QTA must comport with constitutional strictures. 461 U.S. at 286 n.23.

The Secretary's approval of Foster's allotment gave appropriated mineral land to an Alaska Native even though Congress declared that Alaska Natives could only be allotted unappropriated non-mineral lands. The Secretary may not agree that Alaska Natives should be limited to a specific category of land when seeking allotments. However, the exclusive authority granted to Congress under the Property Clause precludes the Secretary and the courts from substituting their judgment for the judgment of Congress "in this congressional area of national power." *California*, 332 U.S. at 27. Nothing in *Dalton* supports the conclusion that the courts are without jurisdiction to review decisions of government officials where, as here, those decisions violate a specific constitutional limitation on executive authority. In fact, *Dalton* recognized that the courts have jurisdiction to review constitutional challenges to executive decisions. 114 S.Ct at 1724.

b. The Secretary's limited authority.

This case is not a mere disagreement over the interpretation of the Allotment Act, as the government suggests. Opp. at 15. Congress mandated that lands necessary for highways and material sources were to be "appropriated and transferred" to the states. 23 U.S.C. § 317. Congress also mandated that appropriated lands could not be allotted to Native Alaskans. 43 U.S.C. § 270-1. The Secretary of the Interior flaunted an express limitation on his disposal authority with regard to appropriated lands when he allotted lands that had already been appropriated to Alaska, and then acted to cancel Alaska's right-of-way based upon his *ultra vires* approval of Foster's allotment.

It makes no difference, as the government argues (Opp. at 17), that BLM appropriated and transferred to Alaska an easement rather than a fee interest in the disputed property. The authority cited by respondents either does not concern the Allotment Act, 43 U.S.C. § 270-1, or does not concern the Highway Act, 23 U.S.C. § 317. The Allotment Act does not differentiate between different types of interests. The Act differentiates between lands that are appropriated and those lands which are not appropriated. Lands that are appropriated before Native occupancy commences are unavailable for allotment. There is no dispute in this case that Alaska's right-of-way was appropriated long before Foster initiated her occupancy.[2]

---

[2] The respondents argue extensively (Opp. at 18) that the disputed land is not mineral land. Although Alaska maintains its position in this regard, it is unimportant, for purposes of